No. 88-97

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

FORD MOTOR COMPANY,
Petitioner,

vs.

GARY BRYANT,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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Four Arguments raised by Respondent Bryant's Brief in Opposition require Petitioner's reply.[1]

First, contrary to Respondent's assertion, the Ninth Circuit has announced a rule of general application that absolutely precludes early removal under federal law when fictitious Does are named pursuant to a state pleading practice. Petitioner apparently concedes this point by stating that, if Does are present, "a removing defendant can never meet its burden, required by federal law, of demonstrating that complete diversity exists." (Opposition p. 7.) Moreover, the decision in *Bryant* directly contradicts Respondent's argument that the Ninth Circuit rule does not impair § 28 U.S.C. 1446(b) (Opposition p. 12). That statute, among other things, authorizes removal within 30 days of receipt of "an amended pleading,

[1]Petitioner is a corporation. Corporate subsidiaries and affiliates have been listed in the Petition.

motion, order or other paper" disclosing that a case has become removable. The rule in *Bryant* explicitly provides that "the 30 day time limit for removal contained in 28 U.S.C. § 1446(b) will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff or dismissed by state court." 844 F.2d at 605-06. Respondent is also incorrect in suggesting that the filing of a memorandum in state court indicating that all essential parties have been served constitutes "unequivocal abandonment" of the Does under *Bryant*. (Opposition p. 12.) The Ninth Circuit expressly stated that "unequivocal abandonment occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants." 844 F.2d 602 n.5.[2]

Second, although it is true that there is no empirical way to demonstrate that the inclusion of Doe defendants is a universal state court practice (Opposition p. 8), it is a logical inference from the many preprinted forms and treatises that recommend their use. The joinder of Doe defendants who are accused of entirely nonspecific conduct with the use of meaningless legal conclusions, is underscored by this case where it is inconceivable that 50

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[2]Under California practice and in order to place a case on the civil trial list, a plaintiff must execute and file an At-Issue Memorandum which certifies, among other things, that all essential parties have been served. Prior to *Bryant*, one could argue that this certification amounts to unequivocal abandonment. At least one court has held that the filing of an At-Issue Memorandum, when coupled with expiration of the three statute to serve parties, constitutes an unequivocal abandonment. *Bertha v. Beech Aircraft Corp.*, 674 F.Supp. 24 (C.D. Calif. 1987). Cf. *Casparian v. Allstate Ins. Co.*, No. 87-5703, (IV.D. Cal. May 16, 1988) (available August 23, 1988, on LEXIS, Genfed library, Dist. file). *Bryant* does not endorse this interpretation.

parties could ever have been added to the action or that the allegations provided some clue as to the identity of the Does. Indeed, in interpreting Doe allegations virtually identical to those here, the Ninth Circuit itself has agreed that "[plaintiff's] complaint 'does not even provide fuel for an imaginative court to speculate as to who the Does might be.' " *Bogan v. Keene*, No. 87-5829, slip op. (9th Cir. Aug. 1, 1988).

Third, Respondent's analysis of *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), erroneously suggests that a summary judgment is not the functional equivalent of a trial on the merits. (Opposition p. 13.) The Ninth Circuit has rejected that contention. *See Stone v. Stone*, 631 F.2d 740, 742 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981), ("We have held that the *Grubbs* rule is applicable when the merits are reached and determined on a motion for summary judgment.); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1476 (9th Cir. 1986); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980); *Sheeran v. General Electric Co.*, 593 F.2d 93 (9th Cir. 1979). The judgment here was also rendered on the merits, not based upon some technical defect. In addition, the assertion that the failure of the District Court to dismiss the Doe defendants prevented a finding of complete diversity (Opposition p. 13) is a circular argument. The District Court treated the Does here as nonexistent and Respondent's contention avoids the issue of whether, after judgment was rendered, the District Court had jurisdiction over the parties as governed by the judgment.

Fourth, Respondent's claim that he was provided no mechanism in federal court to join additional defendants (Opposition p. 9) is misleading. While it is true that a plaintiff loses the benefit of the state relation back doctrine once a case has been removed to federal court, it is

not true that there is no mechanism in federal court which allows the joinder of new parties. Additional parties here could have been added under Fed.R.Civ.P. 15(c) just as in any other diversity case brought in district court.

For these reasons, and those set forth in the Petition, Petitioner urges the Court to grant certiorari.

Dated: August 25, 1988.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On August 25, 1988, I served the within Petitioner's Reply Memorandum to the United States Court of Appeals for the Ninth Circuit in re: "Ford Motor Company vs. Gary Bryant" in the United States Supreme Court, October Term, 1988, No. 88-97;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 25, 1988, at Los Angeles, California

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